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RESURRECTING INCIPIENCY: FROM *VON'S GROCERY* TO CONSUMER CHOICE

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The merger incipiency doctrine could return. It was conceived in the Celler-Kefauver Act, born in *Brown Shoe,* and achieved maturity in *Von's Grocery*. The doctrine soon began to decline and repeatedly has been pronounced dead. This essay will sketch the origin, meaning, and reasons for the decline of the doctrine. It will show how parts survive today. It will then examine whether a plausible basis exists for reviving significantly stricter or more prophylactic merger enforcement through the incipiency doctrine.

This essay will show that there are aspects of the doctrine that could be revived without returning to the misguided *Von's Grocery* approach to the issue. It will show, for example, how the concept could in part be resurrected if merger enforcement's primary focus returned to its intellectual foundation: a concern with consumer choice.[1] During the Reagan Administration, the sole goal of their permissive merger enforcement policy, a policy that largely ignored the incipiency doctrine, was increased economic efficiency.[2] A return to enforcement based upon the consumer choice standard[3] could help to revitalize more aggressive

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[1] Under a consumer choice approach to antitrust, customers are entitled to the array of options that a market without the anticompetitive arrangement would have provided to them. Customers are entitled to a competitive array of both price and nonprice options. For a more extensive discussion of the meaning of a consumer choice standard, see *infra* Parts IV and V and notes 3 and 94.

[2] For a discussion of Reagan Administration merger enforcement, see *infra* Part IV.

[3] A choice approach to antitrust differs from an efficiency approach in several ways. First, it gives more emphasis to nonprice issues (which are, in theory, accounted for in efficiency analysis, but often are ignored as a practical matter). Second, a choice standard includes a concern with wealth transfers from consumers to firms with market power caused by an absence of price-related options. Third, a choice standard would sometimes value having additional options as an end in itself. (Of course, a preference for a larger number of options, even if this could raise costs, can be expressed as an efficiency concern

enforcement.[4] This essay also will discuss other ways—including the concern that a transaction might lead to a merger trend or wave, and a "sliding scale" approach to especially large transactions in highly concentrated industries—in which the Merger Guidelines and merger enforcement and decisions could become even more faithful to the Congressional goals underlying the incipiency doctrine.

I. THE ORIGIN OF THE INCIPIENCY DOCTRINE

The incipiency doctrine originated in the Celler-Kefauver Amendment to the Clayton Act[5] and in the earliest Supreme Court interpretations of the prohibition against mergers the effect of which "may be substantially to lessen competition or to tend to create a monopoly."[6] In *Brown Shoe Co. v. United States,*[7] the Supreme Court laid the foundation for the doctrine by blocking a horizontal merger that would have increased the defendant's market share from 5.6 percent of the national market for shoes to 7.2 percent, an increase in the Herfindahl-Hirschman Index (HHI) of less than 20.[8] The Court explained that because of a "rising tide of economic concentration—[Congress wanted mergers to be blocked] at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. . .[Congress wanted to] brake this force at its outset and before it gathered momentum."[9] Some immedi-

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insofar as this would place a value upon and incorporate the value of diversity.) For a more extensive discussion of the meaning of a consumer choice standard, see *infra* Parts IV and V and Averitt & Lande articles, *infra* note 95.

[4] Whether more robust enforcement would be desirable is beyond the scope of this essay. So is the question of how strict merger enforcement should be. This essay will, however, focus upon several bases upon which revitalized enforcement could be founded.

[5] *See* 15 U.S.C. § 18. For an analysis of the legislative history of the Celler-Kefauver Act on the incipiency issue, see *Brown Shoe Co. v. United States,* 370 U.S. 294, 316–17 (1962); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 599 (2000); Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency View Challenged,* 34 HASTINGS L.J. 65, 130–40 (1982).

[6] 15 U.S.C. § 18.

[7] 370 U.S. 294 (1962).

[8] The market shares were different for different categories of shoes. *See id.* at 347–54 (app. A, B, and C) (charting the market shares separately for women's, children's, and men's shoes). The opinion did not, however, calculate the change in HHI.

[9] *See id.* at 317–18. Several excerpts from the Court's analysis of the Act's legislative history follow: "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. Further, the Court held: "[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this

ate threats to competition also might have played a role in the Court's decision, including much higher increases in concentration in a number of local geographic markets.[10] Moreover, the opinion never defined the incipiency concept clearly. Nevertheless, the doctrine was born.

United States v. Philadelphia National Bank[11] repeated the incipiency language. The context made the reference largely dictum, however, because the merging parties had market shares of approximately 15 percent and 20 percent, and the merger would have increased the HHI by approximately 600 to a HHI level of 2,000.[12] These structural factors were substantially above the necessary level that could help cause a merger to be challenged today. It is therefore unsurprising that the opinion did not define or clarify the meaning of the incipiency doctrine.

Von's Grocery,[13] which soon followed, is often considered the quintessential incipiency case.[14] In *Von's Grocery* the Court blocked a merger that would have created a grocery store chain which controlled approximately 7.5 percent of grocery sales in the relevant market.[15] Although the earlier decisions arguably were justified by significant increases in concentration, not even a sympathetic reading of *Von's Grocery* can ignore the fact that the proposed merger would have led to an increase in the HHI of less than 20 in a market whose HHI concentration level would have been

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force at its outset and before it gathered momentum." *Id.* at 317–18 ("Acquisitions of stock or assets have a cumulative effect, and control of the market . . . may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition."); S. REP. No. 1775, 81st Cong., 2d Sess. 4–5 ("The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."). The Report of the House Judiciary Committee on H.R. 515 recommended the adoption of tests more stringent than those in the Sherman Act. H.R. REP. No. 596, 80th Cong., 1st Sess. 7. *See* generally *Brown Shoe*, 370 U.S. at 315–24. The "rising" concentration that was of concern to Congress could have been concentration within particular industries, or concentration generally throughout the economy.

[10] *See Brown Shoe*, 370 U.S. at 347–50 (app. A). The merging firms had large market shares in dozens of towns and small and medium sized cities, including market shares of 23.3% and 34.4% in Dodge City, for example, an HHI increase of 1603. *See id.*

[11] 374 U.S. 321 (1963).

[12] These figures are approximations, and the HHIs were not in the opinion. The precise numbers depend upon whether the market is measured in terms of assets, deposits, or loans. *See id.* at 330–31. Of course, if this same merger were considered today, a number of factors would be considered in addition to market share and concentration level, and the relevant market might not be defined the same way.

[13] 384 U.S. 270 (1966).

[14] It might be considered the quintessential incipiency case because it involved none of the complications of the earlier decisions.

[15] *See* 384 U.S. at 272.

less than 300.[16] Not surprisingly, *Von's Grocery* often is "credited" as being the high point, if not the actual origin, of the doctrine. But, what, exactly, did "incipiency" mean?

II. POSSIBLE MEANINGS OF THE INCIPIENCY DOCTRINE

The legislative history and decisions that gave rise to the incipiency doctrine are disappointingly vague.[17] As a result, although it is clear that the concept calls for strict antimerger enforcement, no firm definition of incipiency has been established. The doctrine can be understood in at least five possible ways:

1. *The incipiency doctrine prohibits even very small decreases in competition.* Before the Clayton Act was passed, the Sherman Act prevented mergers likely to lead to a monopoly, or even the dangerous probability of one.[18] Congress did not, however, consider this approach to merger enforce-

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[16] These calculations are based upon the numbers in Justice White's concurrence. *See id.* at 280–81 (White, J., concurring). The precise market shares for the merging companies and for their competitors were of course different in different years. Further, if the market were defined differently—for example, in terms of chain stores—the HHI numbers would change.

Some of the criticism of *Von's Grocery* might be unwarranted. Richard Stern notes:

> The decision was widely reviled because the combined market share of Von's and Shopping Bag was quite small, as measured using as denominator (universe) a Los Angeles County market or a LA County + Orange County market. But that was an unrealistic market in that customers would not drive more than a few minutes. For example, nobody would drive from West Los Angeles to Whittier for groceries. The countywide % data thus understated the market impact of the merger. The "true" market was a set of overlapping roughly circular zones centered on each supermarket location, where each (sub) market border had a somewhat indeterminate contour. Each customer had a slightly different distance it would drive. Hence the market border around each supermarket location was like a contour map, say a target where 100% of customers would be willing to drive to the supermarket if they lived 0 distance (the bull's-eye of the target), 80% if they lived within 5 blocks, 60% if they lived within 10 blocks, 40% if they lived 15 blocks, etc. Or you could represent the market as a spatter print,with the ink dots very close together near the supermarket and farther apart radially out . . . this goes to show the imperfectness of "relevant market" as a conceptual tool to determine market power. It is a blunt instrument. But because it seemed infeasible to use anything but gross countywide market shares in the Von's case, that was what they used.

E-mail from Richard Stern to author (Aug. 4, 2000) (on file with author).

[17] *See supra* notes 5–9 and accompanying text. For an excellent analysis of the incipiency concept in the closely related contexts of the FTC Act and FTC Act cases, see Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 242–51 (1981). The relevant FTC Act legislative history and cases' incipiency language also is unclear, however, so it is uncertain precisely what the doctrine means in an FTC Act context. *See id.* at 242–27.

[18] *See* 15 U.S.C. § 2.

ment to be tough enough.[19] It enacted the antimerger laws to prevent even relatively small "lessen[ings]" of competition, decreases that only "tend" to create a monopoly, even if these mergers would not violate the Sherman Act.[20]

The structural thresholds in the current Merger Guidelines[21] reflect this concern, at least to a degree. For example, the Guidelines contain a presumption that market power will be created or enhanced whenever a merger increases concentration by an HHI of more than 100 to a level in excess of 1800.[22] Although these are not *Von's Grocery*'s numbers, neither would mergers slightly in excess of these thresholds violate the Sherman Act.[23] Whether the thresholds in the Guidelines and the actual stringency of enforcement fully reflect the Congressional incipiency concern is, of course, a matter of opinion.[24]

2. *The merger under review should be blocked because it could cause an industry trend or wave toward mergers. Even if the transaction under review would not by itself create competitive harm, if such transactions were permitted, the cumulative effects of a number of similar transactions could harm competition.* In other words, a merger should be blocked whenever anticompetitive harm would be likely to result from several more-or-less-identical mergers that would be reasonably likely to arise if the first merger were permitted.[25] In part to prevent a race to merge before the industry becomes unduly concentrated, even otherwise innocuous mergers should be blocked at the start of the merger wave.[26]

Although it is difficult to determine when a trend or wave is likely to start or continue, at some point—perhaps not until the second or third

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[19] *See* Lande, *supra* note 5, at 128, 136.

[20] *Id.* It is difficult to ascertain the cumulative meaning of the modifiers of the "lessen" standard: the "may" and the "substantially" requirements. *See* the discussion of the "may" language in terms of a lower required probability of anticompetitive behavior, *supra* Part II(4).

[21] U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992, revised 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104.

[22] *See id.*, § 1.51, at 20,569–63. This presumption can, of course, be overcome.

[23] *See, e.g.*, the cases cited *infra* note 35.

[24] To the extent the enforcers use significantly higher thresholds in practice, their enforcement would not embody the incipiency concept. *See infra* note 54.

[25] It is possible that a merger could cause other firms to merge, out of a fear that the first merger would place them at a competitive disadvantage. A single merger could even cause an entire industry to consolidate. This undue consolidation could come quickly, from a sudden wave, or slowly, from a gradual industry trend. These mergers could be within the same industry, or in an upstream or downstream market.

[26] Of course, a merger trend within an industry could be caused by procompetitive reasons, and this possibility also would have to be considered by the enforcers.

similar merger[27]—the trend or wave should be recognized and halted. A merger may spark a trend for many reasons, including the "lemming" or "copycat" effect.[28] For example, soon after Pepsi announced that it wanted to acquire Seven-Up, Coca-Cola announced that it would purchase Dr Pepper.[29] Coke's announcement was widely seen as a tactical move, one caused by Pepsi's announcement. One possible outcome would have been for both mergers to be approved, thus increasing Coca-Cola's market strength.[30] Alternatively, both mergers could have been turned down, thus preventing Pepsi from roughly catching up to Coca-Cola in terms of market position.[31] In either event, Coca-Cola would come out ahead relative to not attempting its own merger.[32]

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[27] One could also ask why the first of several similar mergers should be permitted even though the subsequent ones should be blocked. This policy could create a perverse industry-wide incentive: If firms believe that a merger trend might start, they might decide to merge as quickly as possible to escape the incipiency doctrine. Thus, the absence of an incipiency doctrine could encourage ill-considered and inefficient mergers.

The firms could even be in a "prisoners' dilemma." They might all be better off if none merged. If any two merged, however, they might all be forced to merge by competitive pressures and/or network effects. Since the last mergers might well be blocked, each firm could have an incentive to be one of the first to merge.

[28] *See* SULLIVAN & GRIMES, *supra* note 5, at 600. The authors state:

> A rival may think or fear that the merger will create efficiencies . . . [or] perceive the merger as giving strategic (perhaps anticompetitive) advantages to the merged firms . . . [or the CEO] may simply not know what the effects of the merger may be, but desire to copy the merger lest the board of directors ask why the CEO is not in-line with the industry trend.

Id. A wave of mergers may also be generated by a fear of not having a suitable choice of partners, or a fear that the antitrust door could close after the market becomes too concentrated. Further, some investment counselors advise buying stock only in the leading firms in an industry, so a firm might want to merge to increase shareholder value.

Recently there was a prominent case that might qualify as an example. After the AOL/Time Warner merger was announced, there was intense speculation that if this merger were permitted it would lead to other large media mergers. *See Hearing on the America Online/Time Warner Merger Before the Committee on Commerce, Science, and Transportation, U.S. Senate* (statement of Robert H. Lande, Mar. 2, 2000). This testimony was delivered on behalf of the American Antitrust Institute and is available at http://www.antitrustinstitute.org/recent/59.cfm.

[29] *See* SULLIVAN & GRIMES, *supra* note 5, at 600.

[30] Coca-Cola later admitted that there was an internal memo suggesting that Coke make a bid for Dr Pepper in part to thwart the Pepsi/Seven-Up merger. *See* Dave Skidmore, *Federal Judge Blocks Coca-Cola-Dr Pepper Merger,* ASSOCIATED PRESS, July 31, 1986, *available at* 1986 WL 3065832; Andy Pasztur & Timothy Smith, *Coke Launched Dr Pepper Bid to Scuttle Plans by PepsiCo., Documents Indicate,* WALL ST. J., July 29, 1986, *available at* 1986 WL 253211.

[31] Both mergers were challenged and eventually were abandoned or blocked. *See* FTC v. Coca-Cola Co., 641 F. Supp. 1128 (D.D.C. 1986).

[32] "Coca-Cola Co. had been expanding without acquisition, but when PepsiCo., its principal competitor, sought to make a major acquisition of 7-Up Co., Coke apparently felt it should have the same privilege, if the rules permitted." *Id.* at 1131.

Another possible example is seen in *FTC v. Cardinal Health Inc.*, 12 F. Supp.2d 34 (D.D.C. 1998). This case involved two drug wholesalers, each of which wanted to purchase another

3. *Since errors of both over-enforcement and under-enforcement are inevitable, merger enforcement should err on the side of over-enforcement.* Under this definition, the Clayton Act should be thought of in terms of Type I and Type II error, and the incipiency mandate means that decisionmakers should err more on the side of making Type I errors.[33] One justification for this approach to the incipiency doctrine is that the risks of over-enforcement are likely to be lower in the merger context than for Sherman Act violations, where criminal penalties, treble damages, and the break-up of an ongoing company is possible.[34] Because of these severe penalties, a Sherman Act violation should only be found under relatively unusual circumstances. Since merger actions today involve only injunctions, however, the risk of over-enforcement is not so undesirable. Moreover, because market forces will tend to correct over-enforcement errors by, for example, causing any efficiencies that might have been obtained from the merger instead to be achieved through contracts or in other ways, merger injunctions should be granted relatively freely.

4. *A lower probability of harm will suffice for a violation of the Clayton Act than that required for a violation of the Sherman Act.* All antitrust decisions are predictions made with uncertain probabilities. The Sherman Act blocks mergers likely to lead to monopoly power or the dangerous proba-

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drug wholesaler. Cardinal Health announced a merger with Bergen, and merger discussions between McKesson and AmeriSource "quickly ensued." *Id.* at 43–44. Although McKesson officials insisted its merger was unrelated to Cardinal's, commentators opined that the two were linked, and that the company wanted the FTC to view the mergers together. *See, e.g.,* Chris Serb, *Big . . . Bigger . . . Biggest: McKesson's Play Clouds Chances that the FTC Will OK Two Major Deals,* HOSPITALS & HEALTH NETWORKS, Dec. 5, 1997, at 46, *available at* 1997 WL 9576661; *McKesson/AmeriSource Merger Would Create Company with 38% Market Share,*THE GREEN SHEET, Sept. 29, 1997, *available at* 1997 WL 18975239.

If Cardinal and Bergen were allowed to merge, McKesson would have lost its number one spot in the industry. *See* Serb, *supra*; THE GREEN SHEET, *supra.* McKesson's merger was announced so soon after Cardinal's that it appears likely that the FTC would have allowed both mergers to proceed or disallowed both; but either way, McKesson would have remained on top. *See* Serb, *supra*; THE GREEN SHEET, *supra*; *FTC Wants More Merger Detail from Bergen Brunswig Pharmaceuticals: Sale of Orange Firm to Cardinal Health Raises Antitrust Concerns,* L.A. TIMES, Sept. 27, 1997, at D1, *available at* 1997 WL 8271877; *Waving a Red Flag Before Regulators,* BUS. WK., Oct. 6, 1997, at 54, *available at* 1997 WL 8271877. McKesson's tactic has been labeled as similar to Coca-Cola's announcement to acquire Dr Pepper. *See* Nikhil Deogun & Robert Guy Matthews, *Alcan Leaves Door Open to Reynolds Bid,* WALL ST. J., Aug. 13, 1999, at A3, *available at* 1999 WL-WSJ 5464410. The FTC did consider the Cardinal/Bergen and McKesson/AmeriSource mergers together, and both were blocked. *See Cardinal Health, Inc.,* 12 F. Supp.2d 34.

[33] *See* Lande, *supra* note 5, at 134–35. For a discussion of Type I (stopping beneficial mergers) and II (allowing undesirable mergers) errors in a merger enforcement context, see Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement,* 71 CAL. L. REV. 1580, 1670–77 (1983). In addition, Type III error, which includes enforcement, cost, and effects on business certainty, should also be considered. *See id.*

[34] Minimizing Type II error would be the incipiency doctrine; minimizing Type I error would be Chicago-school antimerger enforcement.

bility of monopoly power, and is a mixed civil/criminal statute.[35] The Celler-Kefauver Amendment to the Clayton Act, by contrast, is designed to block mergers the effect of which "may be substantially to lessen competition or to tend to create a monopoly."[36] Incipiency could be defined through a stress on the "may" language, in contrast to the Sherman Act requirement of a likely "monopoly" or the "dangerous probability" of one. Relatively greater uncertainty about whether the merger is likely to be anticompetitive will still lead to a Clayton Act violation.[37]

One practical way to implement the probability orientation of the doctrine, as well as the error issue contained in the previous definition, would be to have especially strict enforcement for the largest mergers in the most highly concentrated industries. For these mergers there would be an unduly large probability that erroneously allowing the merger would adversely affect competition and consumer welfare.[38] Alternatively, either *Philadelphia National Bank*'s presumption that these mergers were anticompetitive[39] or a "sliding scale" approach that was toughest on the very largest mergers could be a way to implement this version of the incipiency concept.[40]

5. *The Clayton Act should look further into the future for possible harm.* In contrast to thinking of incipiency in terms of cumulative effects, trends, amount of harm, probability of harm, or errors, this definition is temporal in nature. Instead of worrying about present harm, it looks to the future and hypothesizes more broadly about the eventual impact of a merger. Suppose, for example, that merging firms do not make any products that currently compete with one another, and that they are each the dominant producer of related products. Suppose also that the

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[35] *See id.; see also, e.g.,* Brooke Group Ltd. v. Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (interpreting the Sherman Act to "condemn predatory pricing when it poses 'a dangerous probability of actual monopolization'" (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455 (1993)); *Spectrum Sports, Inc.,* 506 U.S. at 459 (holding that a company may not be liable for attempted monopolization under Section 2 of the Sherman Act absent proof of a dangerous probability of monopolization).

[36] *See* 15 U.S.C. § 18.

[37] By contrast, if we require virtual certainty that a merger will lead to anticompetitive effects, very few mergers would be blocked.

[38] This assumes that there is a correlation between concentration and either profit or price. For a discussion of this issue, see *infra* notes 61–67 and 121.

[39] *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 362, 363 (1963).

[40] All guidelines numbers embody predictions. The Merger Guidelines could, in effect, contain a prediction that we are more confident that an HHI increase of 400 in a highly concentrated market will increase market power than we are that an HHI increase of 100 will do so.

enforcers and court believe it is likely that these related products will converge and compete with each other in three to six years. This prediction would, of course, have to be based upon reasonably reliable evidence. Nevertheless, such a merger could be enjoined under the incipiency doctrine.[41] It is possible that this meaning of incipiency is used today, except that it is termed a concern with innovation markets.[42]

Congress and the Supreme Court have never clarified which of these five possible meanings were intended, or whether they were all desired.[43] Moreover, the definitions overlap and reinforce one another. Nevertheless, it is clear that they feared significantly increasing industry-wide concentration and wanted very strict antimerger enforcement. In *Von's Grocery*, for example, the Court seemed concerned that the number of firms in the market had diminished from 5,365 in 1950 to 3,818 in 1961.[44] But why, exactly, was increasing concentration within industries so bad? Part of the Court's concern appeared to be with the disappearance of small businesses as an end in itself.[45] A concern with the disappearance of small businesses should, however, be distinguished from a fear of rising concentration. Mergers of small businesses rarely raise concentration as much as do the mergers of medium and large businesses. Perhaps for this reason the disappearance of small businesses is now largely recognized as a social concern irrelevant to antitrust analysis. For example, the defendants in *Von's Grocery* were chains ranked number three and six in the Los Angeles metropolitan area.[46] While they certainly were not Fortune 500 companies, neither were they "Ma and Pa" corner grocery stores. The merger of two "Ma and Pa" corner grocery stores into a tiny chain would indeed represent the loss of a small business. But its effect on the overall concentration of the Los Angeles grocery market, and on competition within this market, would be infinitesimally small.

Only in *Philadelphia National Bank* did the Court give reasons why it feared the ultimate harms that could come from incipient harms to

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[41] This assumes the existence of barriers to entry, etc.

[42] Whether innovation markets are actually used today, or whether the enforcers and the courts are really concerned with future goods markets, is controversial. See the excellent and provocative discussion in Lawrence B. Landman, *Competitiveness, Innovation Policy, and the Innovation Market Myth: A Reply to Tom and Newberg on Innovation Markets as the "Centerpiece" of "New Thinking" on Innovation*, 13 ST. JOHN'S J.L. COM. 223 (1998). The rationale behind blocking these mergers could also be framed in terms of the potential competition doctrine.

[43] *See supra* notes 5–9 and accompanying text.

[44] *See Von's Grocery*, 384 U.S. at 273.

[45] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 315–16 (1962). *See also* Lande, *supra* note 5, at 139–40, for an analysis of the Act's legislative history on this point.

[46] *See Von's Grocery*, 384 U.S. at 272.

competition. The Court discussed the anticompetitive effects of undue concentration and the reason why it created a presumption that unduly large mergers were anticompetitive[47] in terms that resonate into the 21st century.[48] The Court expressed a concern with possible adverse effects of the merger on "price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services . . . ."[49] The Court thus explained its fear of undue concentration in terms of a reduction in either price or nonprice competition that might harm consumers.[50] The Court wanted consumers to be able to choose freely on the basis of any price or nonprice issue important to them. The Court feared that a merger might lead to an "incipient" reduction of some aspect of consumer choice.[51]

In sum, the meaning of the incipiency doctrine is uncertain. It is clear that Congress favored strict merger enforcement and feared trends towards concentration. We also know that the incipiency idea called for a variety of types of predictions, and that its ultimate objective was to preserve a competitive level of consumer choice (i.e., to preserve both price and nonprice competition). The early cases that established the doctrine, moreover, have never been overruled. The incipiency doctrine cannot, however, be defined more precisely than this.

III. THE DECLINE OF THE INCIPIENCY DOCTRINE

All of the doctrine's definitions call for strict merger enforcement, but merger enforcement started to loosen soon after *Philadelphia National Bank*. The 1968 Merger Guidelines's[52] numerical thresholds were significantly higher than those suggested by *Von's Grocery*.[53] The 1982 Merger Guidelines contained still higher numerical thresholds, in many other respects loosened enforcement,[54] and omitted all concern with the trend-

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[47] *See Philadelphia National Bank*, 374 U.S. at 363.

[48] *Id.* at 362–70.

[49] *See id.* at 368.

[50] *See id.* at 364.

[51] *See also* cases cited *infra* note 94.

[52] U.S. Department of Justice Merger Guidelines §§ 5 & 6 (1968), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,101.

[53] *See* Paul Pautler, *A Review of the Economic Basis for Broad-Based Horizontal Merger Policy*, 28 ANTITRUST BULL. 571 (1983).

[54] *See id.*; Thomas Krattenmaker & Robert Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211 (1988).

to-concentration issue and many other possible definitions of incipiency. Merger enforcement during the Reagan Administration showed even greater tolerance towards mergers, and completely ignored the incipiency doctrine.[55] For example, although the 1982 Merger Guidelines provided a safe harbor for post-merger HHIs of less than 1000 and stated that a challenge was "likely" if the merger would have increased the HHI by more than 100 to a post-merger level in excess of 1800,[56] during much of the Reagan Administration mergers rarely were challenged unless they would have increased the HHI by at least 250 to a level of at least 1800.[57] In actual practice, there was roughly a "[d]e facto doubling of the HHI standards."[58] Not surprisingly, the number of merger challenges declined significantly during this period.[59] The fate of the incipiency doctrine can also be documented by noting the sharp decline in the number of times that the words "incipiency" and "trend to[wards] concentration" have been used in merger decisions since *Brown Shoe.*[60] There are several reasons for the doctrine's decline.

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[55] *See id.* at 226–27.

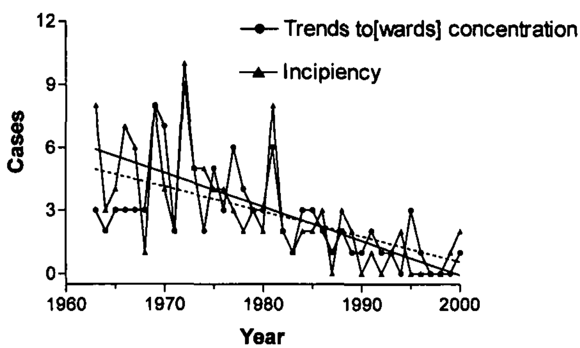
[56] *See* U.S. Department of Justice Merger Guidelines § III A 1 a, c (1982), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,102. The 1984 Guidelines, however, softened this language, and only stated that such mergers very likely to create or enhance market power—an effective further loosening of the Guidelines' standards. *See* U.S. Department of Justice Merger Guidelines § 1 & n.4 (1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103.

[57] *See* Krattenmaker & Pitofsky, *supra* note 54, at 227. Similarly, Malcolm Coate notes: "[During] the Bush Administration, the weight of the evidence suggests that the FTC was likely to bring cases if the HHI exceeded 2400 with a change of 500—[and] [e]nforcement decisions were rare if the post merger HHI was less than 1800 or the change was less than 200. . ." Malcolm B. Coate, *Merger Enforcement at the Federal Trade Commission in Three Presidential Administrations*, 45 ANTITRUST BULL. 323, 335–36 (2000).

[58] *See* Krattenmaker & Pitofsky, *supra* note 54, at 228.

[59] *See id.* at 226–28.

[60] *See* chart, formulated by Westlaw searches in the Supreme Court (SCT), Federal Courts of Appeals (CTA), and Federal District Court (DCT) databases: merger & incipiency & da [aft 06/25/1962]; merger & trend/s concentrat! & da[aft 06/25/1962]; merger/s wave & da[aft 06/25/1962].



First, due to advances in economic learning, the consensus in the antitrust field over the deleterious effects of high industry concentration changed. The field has become less certain that there is a significant and valid correlation between concentration and profitability.[61] The field also has become less certain whether there is a correlation between concentration and price.[62] Even many who believed that higher concentration often leads to higher prices often find these effects to be small,[63] and believe that the correlation between concentration and price only manifests itself at relatively high levels of concentration.[64] Although respected scholars continue to believe that higher concentration often leads to higher prices and profits,[65] and the debate rages on,[66] at a minimum, it is safe to conclude that today fewer members of the antitrust community believe strongly in the structure-conduct-performance hypothesis. Under this relatively skeptical view of the anticompetitive effects of concentration, the HHI levels in the current Merger Guidelines can be viewed as embodying the incipiency doctrine.[67]

A second change has been the increasing recognition that mergers often lead to significant efficiencies.[68] During the period when efficiencies from mergers were viewed as rare and possibly even undesirable, nothing was lost from a strong incipiency doctrine.[69] However, as the profession increasingly came to appreciate that these efficiencies were common, significant, and desirable, the incipiency doctrine lost its

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[61] *See* Barry C. Harris & David D. Smith, *The Merger Guidelines v. Economics: A Survey of Economic Studies*, ANTITRUST REP., Sept. 1999, at 23, 35–36. Richard Schmalensee, Inter-Industry Studies of Structure and Performance, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951, 976 (Richard Schmalensee & Robert D. Willig eds., 1989) ("The relation, if any, between seller concentration and profitability is weak statistically, and the estimated concentration effect is usually small. The estimated relation is unstable over time and space and vanishes in many multivariate studies."). *See also* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 411 (3d ed. 1990). But see the material cited *infra* notes 66 and 121.

[62] Harris & Smith, *supra* note 61, at 36–37.

[63] *See id.* at 36–37, 43.

[64] *See id.* at 42.

[65] *See id.* at 42–43.

[66] *See id.; see also* FTC BUREAU OF ECONOMICS STAFF REPORT, TRANSFORMATION AND CONTINUITY: THE U.S. CARBONATED SOFT DRINK BOTTLING INDUSTRY AND ANTITRUST POLICY SINCE 1980 (Nov. 1999) (concluding on page viii that "Horizontal franchise acquisitions by Coca-Cola and Pepsi-Cola bottlers led to . . . prices that were 3.5%–12.8% higher than otherwise); *infra* note 121.

[67] *See* the discussion in SULLIVAN & GRIMES, *supra* note 5, at 601.

[68] *See* Fisher & Lande, *supra* note 33.

[69] *See id.* at 1582 n.4 & 5, 1599–624.

attraction and even became viewed as counterproductive.[70] Moreover, there are two general methods that can be used in attempts to capture efficiencies from mergers. The first, a case-by-case approach, would implement an explicit efficiencies defense. The second approach would be to obtain efficiencies on average by raising the effective safe harbors in the Guidelines.[71] The latter method is the equivalent of ratcheting back the incipiency doctrine.[72]

A third change—increasingly skeptical decisionmakers—was especially true during the Reagan Administration.[73] For example, a Reagan-era Assistant Attorney General for Antitrust, J. Paul McGrath, announced that he was challenging mergers under a Sherman Act standard.[74] His successor, Douglas Ginsburg, believed that enforcers should evaluate mergers under a "criminal law standard" and presumably not challenge mergers unless they were sure, beyond a reasonable doubt, that the merger would be anticompetitive.[75] Conservative enforcers also may have had less faith in the ability of the government to accurately predict future anticompetitive outcomes in a market, and more faith in the market's ability to self-correct.[76]

The Reagan era also brought in an increasingly conservative judiciary[77] that promulgated a series of decisions that discouraged strict enforcement. For example, the courts held that mergers should not be blocked where entry is relatively quick and easy, where the exercise of market

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[70] For example, a trend towards concentration in an industry might reflect technological change, reduced demand, or an innocuous industry realignment.

[71] *Id.* at 1651–77.

[72] The optimal strictness of merger enforcement can be expressed in terms of a balancing of efficiency against harmful price and nonprice effects. To the extent mergers often cause significant efficiencies, merger enforcement should be more permissive. To the extent mergers cause anticompetitive effects, enforcement should be more stringent. This article will not discuss the optimal balance. For many of the relevant considerations, see Fisher & Lande, *supra* note 33.

[73] *See* Krattenmaker & Pitofsky, *supra* note 54.

[74] *See* Neil Henderson, *Baldrige Merger Plan Criticized Changes in Law Called Unnecessary*, WASH. POST, Mar. 3, 1985, at F1, *available at* 1985 WL 2130025.

[75] *See* Douglas Ginsburg, *The Appropriate Role of the Antitrust Enforcement Agencies*, 9 CARDOZO L. REV. 1277, 1283 (1988).

[76] *See, e.g.*, 1992 Guidelines, *supra* note 21, § 2.1.

[77] *See, e.g.*, David Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1166–67 (1999) (noting there is a predominance of Republican judges in the federal judiciary); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 395 n.87 (1999) (recognizing a "long stretch of Republican appointments to the federal bench during the 1980's and early 1990's") (citations omitted).

power would be checked due to presence of powerful buyers, and where high market shares do not accurately predict the merger's potential for harm.[78] During this period the courts eroded and limited the application of the *Philadelphia National Bank* presumption that mergers leading to extremely large market share are anticompetitive. An opinion by (then) Judge Clarence Thomas even appears to have taken the position that the presumption has been completely abolished.[79]

In sum, regardless of the legislative history of the Celler-Kefauver Act, courts are reluctant to implement any version of the incipiency doctrine to the extent that largely conservative judges and justices believe that its intellectual foundations have eroded. While the concept has never explicitly been overruled in any decision, the courts and enforcers have usually ignored it in recent years. Not surprisingly, even though every possible definition of the doctrine calls for very aggressive enforcement, this strictness has to a large extent disappeared from merger analysis.

IV. DISTILLING INCIPIENCY TO ITS GOAL: CONSUMER CHOICE

There is no logical basis for a return to merger enforcement as strict as the approach in *Von's Gocery*.[80] Nevertheless, merger enforcement today is significantly more aggressive than during the Reagan Administration.[81]

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[78] For a discussion of the relevant cases, see Robert H. Lande & James Langenfeld, *From Surrogates to Stories: The Evolution of Federal Merger Policy*, ANTITRUST, Spring 1997, at 5.

[79] *See* United States v. Baker Hughes Inc., 731 F. Supp. 3 (D.D.C. 1990), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990).

[80] An interesting example of this evolution in thinking is that of Judge Posner. He argued *Von's Grocery* while a member of the Solicitor General's office, and "was perfectly convinced of the soundness of the government's position." Kathleen E. McDermott, *Whatever Happened To . . . Von's?*, ANTITRUST, Summer 1993, at 46, 46. He subsequently came to believe that the merger in question "was completely harmless." *Id.*

[81] Perhaps surprisingly, much of the increase in aggressiveness may have taken place during the Bush Administration. For example, Malcolm Coate shows that "[a]fter an increase from the low levels of the mid 1980s, FTC enforcement, as a share of reportable transactions, has remained relatively constant from the late 1980s through 1996." Coate, *supra* note 57, at 347. To the extent this is true, the failure of the current administration to be even more aggressive than it has been might be explained by the tightly restricted FTC budget, despite a huge merger wave during recent years, and the fact that the enforcers have had to try their cases in front of a judiciary largely appointed by Republicans. *See* Spence & Murray, *supra* note 75, at 1166–167; Koby, *supra* note 77, at 395 n.87 (citations omitted).

Alternatively, perhaps the Clinton Administration has been more aggressive, but this aggressiveness largely has come in the form of markets that are more tightly defined and other changes that less readily lend themselves to quantification. For example, the relevant market in *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997), might not have been defined so narrowly if that case had arisen during the Bush Administration. Alternatively, the Clinton Administration enforcers might have allocated a larger percentage of their

There have certainly been notably vigorous merger enforcement actions during the Clinton Administration, such as the *Staples/Office Depot*[82] and *BP/ARCO*[83] challenges. Moreover, the FTC announced a consent in the *BP/Amoco* merger[84] that seemed designed to convey the message that the agency was concerned with anticompetitive effects even in markets that were only moderately concentrated.[85] FTC Chair Robert Pitofsky even cited *Brown Shoe* for its holding that the enforcers are supposed to consider whether the merger at issue could help cause a merger wave.[86] Nevertheless, the current federal Merger Guidelines do not contain a concern that a merger might lead to other mergers in the same or related industries, or several of the other forms of the incipiency doctrine that were discussed in Part II, above.[87]

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very scarce resources to nonmerger cases, such as *Microsoft, Visa/MasterCard, Toys "R" Us,* and *Intel.*

[82] *See* FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[83] *See* FTC v. BP Amoco and ARCO, FTC File No. 9910192 (Feb. 4, 2000).

[84] *See* Mary Lou Steptoe & Jamie Towey, Recent Trends in Federal Merger Enforcement: The Return of Coordinated Effects Analysis, Speech Before ABA Seminar on Advanced Mergers and Acquisitions Counseling Workshop (June 10, 1999) (analyzing *In re* British Petroleum Co. (BP) & Amoco Corp., Agreement Containing Consent Order, FTC File No. 981-0345 (Dec. 30, 1998); Decision and Order, FTC Docket. No. C-3868 (Apr. 19, 1999)).

[85] The BP/Amoco complaint alleged: "The wholesale sale of gasoline in each market would be moderately concentrated or highly concentrated after the merger. In markets that would be moderately concentrated after the merger, postmerger concentration, as measured by the Herfindahl-Hirschman Index, would increase by more than 100 points to levels between 1,400 and 1,800." BP & Amoco Corp., FTC File No. 981-0354, Complaint ¶ 16. "Premerger concentration in the terminaling markets, as measured by the Herfindahl-Hirschman Index, ranges from more than 1,300 to more than 2,500, and as a result of the merger concentration would increase in each terminal by more than 100 points to levels ranging from more than 1,500 to more than 3,600." *Id.* ¶ 14. For other examples and analysis, see Steptoe & Towey, *supra* note 84, at 26–33.

However, it should be emphasized that this administrations's renewed aggressiveness largely has been untested in the courts. Parties often settle cases even if there would be a good chance that ultimately they would prevail in court.

[86] *See* Robert Pitofsky, Chairman, Federal Trade Commission, The Nature and Limits of Restructuring in Merger Review, Remarks at the Cutting Edge Antitrust Conference (Feb. 17, 2000), *available at* http://www.ftc.gov/speeches/pitofsky/restruct.htm. Chairman Pitofsky stated:

> [A] decision not to challenge a particular transaction may initiate a trend towards similar transactions in the same industry. . . . The legislative history of Section 7 of the Clayton Act makes clear that the responsibilities of enforcement officials and courts if to weigh not only the anti-competitive effects of the particular deal at issue, but also the possibility that the transaction is part of a merger wave. *See Brown Shoe,* 370 U.S. at 332–34. Our responsibility is not just to examine the merits of a particular transaction, but to take account where the industry, as a result of similar transactions, might be going.

Id. at 6–7. *But see infra* note 115 for remarks by Chairman Pitofsky with a different tone.

[87] The Guidelines omit any explicit concern that a merger might spark similar mergers, a merger wave, or an industry trend towards consolidation. *See* 1992 Guidelines, *supra* note 21, § 1.52. While the Guidelines do not explicitly rule out consideration of these factors,

During the Reagan Administration enforcers believed that the only legitimate goal of merger policy (and other areas of antitrust) was to promote economic efficiency.[88] This view has long been criticized because Congress wanted to prevent prices from rising (it did not just want to prevent overall efficiency from decreasing).[89] Although the two standards are similar, a price standard for merger enforcement should yield more challenges than an approach based solely upon efficiency.[90] Mergers leading to higher consumer prices could be permitted under an efficiency approach if they led to significant cost savings. But under a price approach, any merger leading to higher prices should be blocked.[91] The renewed vigor of current enforcement may in part reflect the enforcers' use of a price, as opposed to efficiency, standard. Despite this renewed vigor, a consumer choice-centered approach to antitrust could cause merger enforcement to become even more robust.

A consumer choice approach to antitrust arises from the observation that if one examines every type of antitrust violation, from price fixing to predation, and asks what they have in common, the answer is they all significantly restrict consumer choice.[92] Antitrust violations all significantly and artificially restrict, distort, or diminish the options that otherwise would be offered by the free market. Consumers are entitled to choose from an array of prices, qualities, varieties, and safety levels that are set by market forces. Consumers are not entitled to any particular level of choices, and more choices are not always desirable.[93] Rather, practices that significantly interfere with the options that the free market otherwise would provide to consumers are termed antitrust violations. A number of Supreme Court decisions have made it clear that under the antitrust laws, consumer welfare consists of much more than low prices.[94] The purpose of the antitrust laws is to give consumers the ability

perhaps they do so implicitly since they embody a healthy skepticism of the ability of the enforcers to "[predict] likely future behavior based on the types of incomplete and sometimes contradictory information typically generated in merger investigations." *Id.* § 2.1.

[88] *See* Robert H. Lande, *The Rise and (Coming) Fall of Efficiency As the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 438, 444 (1988).

[89] *See, e.g.*, Alan A. Fisher, Frederick I. Johnson & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777 (1989).

[90] *See id.* at 794–809.

[91] *See id.*

[92] *See* Averitt & Lande articles, *infra* note 95.

[93] *See id.*

[94] *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) ("an agreement limiting consumer choice ... cannot be sustained"); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 n.5 (1988) (determining that the challenged activity "might deprive some consumers of a desired product"); Bates v. State Bar of Ariz., 433 U.S. 370 n.20 (1977) ("The public is entitled to know the ... useful information that will

to choose freely from among the price and nonprice options that the free market would provide to them.[95] Consumers are entitled, as a matter of the economic property rights given to citizens in our capitalist economy, to the array of options that otherwise would result from the unhindered operation of the free market.[96]

A consumer choice-centered approach could be used independently of any of the meanings of the incipiency doctrine presented in Part II, but could also be used as the foundation for returning to some version of the incipiency concept. A consumer choice approach could embody the enforcers' and courts' decision to revive the ultimate goal of the incipiency doctrine—the legislative desire to preserve the market's competitive offerings for consumers.[97] In this way the intellectual underpinning of the incipiency doctrine could survive, even though its 1960s-style implementation would not.

Since the term "incipiency" was never defined precisely, it is difficult to determine whether consumer choice goals are a central part of it. At a minimum, however, it fairly can be concluded that consumer choice constitutes the intellectual foundation and ultimate goal of the incipiency

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enable people to make a more informed choice"); United States v. Continental Can Co., 379 U.S. 441, 455 (1964) ("price is only one factor in a user's choice"). Many lower court cases also make this point. *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 676 (3d Cir. 1993) (labeling the crucial issue as whether the challenged practice "actually enhances consumer choice"); Berkey Photo v. Eastman Kodak, 603 F.2d 263 (2nd Cir. 1979) (labeling the crucial issue as whether "the free choice of consumers is preserved"); Butler Aviation Co. v. Civil Aeronautics Bd., 389 F.2d 517, 520 (2d Cir.1968) (analyzing effect of corporate acquisition on consumer choice).

[95] For a more thorough discussion, see Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REP. 44 (1998); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

[96] For some of the differences between the choice and efficiency approaches to antitrust, see *supra* note 3. Perhaps the main difference is one of degree. Although efficiency analysis in theory accounts for nonprice aspects of consumer preferences, as a practical matter these attributes are often ignored, in large part because their measurement is so difficult. Of course, sometimes economists are able to measure the value of a new product or service and the value of nonprice attributes of products and services as well. Moreover, their ability to perform the necessary measurements has improved significantly in recent years. For an excellent survey of the relevant literature, see Jonathan B. Baker & Daniel L. Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, 1 AM. L. & ECON. REV. 386, 421–24 (1999) (analyzing new measurement and evaluation techniques and concluding with respect to one technique that "[t]he promise of this new empirical approach is that it will permit the analyst to characterize demand by allowing preferences to vary across buyers in an unrestricted way, potentially providing a richer description of the bases of consumer choice—[however,] the approach has not yet (to our knowledge) been applied in practice by the enforcement agencies in situations in which data sources are often limited along with the available time for discovery and analysis.")

[97] *See supra* Part II.

doctrine. Moreover, if interpreted broadly, the incipiency doctrine can be generalized to a desire for strict enforcement. Under this very general definition the consumer choice concern certainly should be considered a part of it.

V. THE CHOICE APPROACH TO MERGER ENFORCEMENT

As the Court observed in *Philadelphia National Bank*, consumers desire much more from antimerger enforcement than competitive prices.[98] Antitrust at its most fundamental level is about choice—about giving consumers a competitive range of options in the marketplace so consumers can make their own, effective selection from the market's offerings.[99]

The "choice" and "price" approaches to merger enforcement are usually similar. If a market offers competitive prices, its firms usually will offer a competitive array of nonprice choices.[100] Nevertheless, there are two types of situations where nonprice or consumer choice results of mergers should be focused upon separately.

The first involves equilibria that are noncompetitive due to the presence of collusion. In these situations, choice should be factored into the rule of reason along with price and efficiency effects. Consider cases like *Bates v. State Bar of Arizona*,[101] *Indiana Federation of Dentists v. FTC*,[102] *Detroit Auto Dealers Association*,[103] *National Society of Professional Engineers v. United States*,[104] and *California Dental Association v. FTC*.[105] Each involved higher prices and diminished consumer choice.[106] To the extent each

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[98] *See supra notes* 47–50 and accompanying text.

[99] *See supra* note 95.

[100] If a market is price-competitive but consumers want a wider range of models or options, the competing manufacturers normally will extend their product lines. Soft drink consumers who want orange soda will get it, and it does not matter whether orange soda is made by a firm that also makes colas, or even by an orange juice or beer company. No harm, no foul. A series of mergers that would leave only a handful of significant beverage manufacturers might well not offend the antitrust laws.

This is, of course, a greatly oversimplified analysis. The antimerger statute is worded in terms of preventing mergers the effect of which "may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18. To perform the analysis correctly, many factors would have to be examined, including the relevant market shares, industry concentration trends, and barriers to entry.

[101] 433 U.S. 350 (1977).

[102] 476 U.S. 447 (1986).

[103] 111 F.T.C. 417 (1989), *aff'd in part and rev'd in part*, 955 F.2d 457 (6th Cir. 1992).

[104] 435 U.S. 679 (1978).

[105] 526 U.S. 756 (1999).

[106] For an analysis of each case, see Robert H. Lande & Howard P. Marvel, The Three Types of Collusion: Fixing Prices, Rivals, and Rules (unpublished draft, Aug. 24, 2000) (on file with the author).

involved efficiencies, the harm to consumer choice should be added to the price effects and weighed against these efficiencies. An analysis that left out the effects of the activity in question on nonprice competition would be incomplete.[107]

Second, there are situations where a market is price-competitive and firms compete vigorously on nonprice terms, but where a competitive range of nonprice options can exist only if they are provided from organizationally separate entities.[108] This is likely to be significant in fields where innovation, creativity, and objectivity are especially important. For example, communications media compete in part by offering independent editorial viewpoints and an independent gatekeeper function. Five media firms may not be able effectively to respond to a demand for choice or diversity competition by extending their product lines because the new media products will inevitably bear, to some degree, the perspective of their common corporate parent.[109] For these reasons, competition in terms of editorial viewpoint or gatekeeping can be guaranteed only by ensuring that a media market contains a larger number of firms than may be required in other, more conventional markets. The number of media firms (or firms certain other fields, such as fashion or entertainment) necessary to ensure effective variety, diversity, or choice competition may be significantly larger than that required to preserve price competition.[110]

Part III showed how the strength of the antitrust field's belief about the anticompetitive effects of high concentration has eroded over time.

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[107] The harm to consumer welfare from artificially low consumer choice (i.e., consumers whose search costs were raised who might not find the product that was optimal for them) is a deadweight loss, not a transfer captured by the colluders.

[108] *See* Averitt & Lande articles, *supra* note 95.

[109] An important but subsidiary question is, "Who is the real or effective gatekeeper" concerning particular issues? Even an independently owned newspaper has several potential gatekeepers or viewpoint promulgators—its writers, editors, and publisher. A large conglomerate like AOL/Time Warner would have its CEO as its ultimate gatekeeper. On particular issues, different people within the organization would, as a practical matter, have gatekeeping or viewpoint functions. Nevertheless, suppose that the CEO of AOL/ Time Warner instructed the editors-in-chief of all of its publications to endorse the same candidate. This could have frightening consequences for our country. Despite this possibility of decentralized decisionmaking, for merger evaluation purposes there should be a presumption that a media firm's CEO is the gatekeeper for every part of that firm.

[110] This interpretation of the antitrust laws is, moreover, consistent with fundamental First Amendment principles. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that free speech requires variety of opinion and that, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . ."); 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW §§ 20.6, 20.20 (3d ed. 1999) (discussing the purposes of the First Amendment and the First Amendment's interaction with antitrust law).

However, the studies that caused this erosion measured price or profit, not choice.[111] To my knowledge, there has not been serious empirical work showing the extent to which higher concentration leads to diminished consumer choice, how significant this diminution might be, or which concentration levels might lead to this decrease. Much work in this area remains to be done.

Today a consumer choice approach constitutes only a modest part of merger enforcement. The federal Merger Guidelines, for example, have a section titled "Purpose and Underlying Policy Assumptions of the Guidelines,"[112] which contains roughly a dozen references in the text to "price," the "transfer of wealth from buyers to sellers," and similar monetary concepts.[113] Only a single footnote suggests that merger policy includes non-monetary concerns.[114] Thus, while the Guidelines permit consideration of nonprice aspects of consumer choice, the Guidelines are structured in such a way as not to particularly encourage this exercise.

A choice-based approach to mergers might well lead decisionmakers to block significantly more mergers than enforcement based solely upon price or efficiency. Since this largely constitutes untested territory, however, it is impossible to predict the extent to which it could revitalize merger enforcement.

VI. CONCLUSIONS

It is said that a journey of a thousand miles begins with a single step. Unfortunately, if that first step is in the wrong direction, the journey can be a misguided one. If its original goal was a worthy one, the journey should not be abandoned, however, even though a major correction will be needed. Perhaps this will turn out to be the story of the incipiency doctrine.

The doctrine originated as part of a sound Congressional directive that the enforcers and courts prevent mergers reasonably likely to lessen consumer choice. Unfortunately, the misguided *Von's Grocery* doctrine brought the merger incipiency doctrine into disrepute. Although cases like *Staples/Office Depot* demonstrate that merger enforcement has become significantly more aggressive in recent years, for a number of reasons the enforcers and the courts have been reluctant to implement

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[111] *See supra* text accompanying notes 61–66.

[112] *See* Part 0.1; 4 Trade Reg. Rep. ¶13,104, at 20,569-63.

[113] *Id.* at 20,569-63 to 20,571.

[114] Footnote 6 of the 1992 Merger Guidelines reads, "Sellers with market power may lessen competition on dimensions other than price, such as product quality, service, or innovation." *Id.* at 20,571.

the incipiency doctrine even more vigorously,[115] despite the Congressional mandate that they do so.[116]

A renewed incipiency doctrine would involve making predictions, and these predictions would have to be based upon reasonably reliable evidence, not mere speculation. Today the decisionmakers affirmatively are willing to make the necessary predictions only on rare occasions. There is, for example, little guidance concerning how clear the evidence must be before the enforcers will challenge, and the courts will block, a merger because it might lead to another merger or to a merger wave.[117] To the extent this possibility is taken seriously, however, it could lead to significantly stricter merger enforcement through the incipiency doctrine.[118]

Due in part to the relative nonenforcement of the incipiency doctrine, market after market has come to be controlled by only a handful of firms. For example, *Von's Grocery* blocked a merger in the Los Angeles grocery market, which today is dominated by three large firms.[119] Most of the mergers that helped[120] consolidate the Los Angeles grocery market

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[115] *See* Jaret Seiberg, *From out of the Past*, DAILY DEAL, June 26, 2000, *available at* http://www.thedailydeal.com/features/todaysfeature/A24634-2000Jun26.html. The article discusses the decision by UAL to purchase US Airways for $11.6 billion, and how there were widespread rumors that if this deal were permitted, it would be like to lead to similar deals in the airline industry. *See id.* The article speculated that the deal could only be blocked through the use of the incipiency doctrine, but quoted the Chairman of the FTC, Robert Pitofsky that, "it would be 'unfair' to the merging companies to speculate over whether these other deals really will happen. . . . 'There are so many rumors about so many deals.' Pitofsky said, 'We don't take those into account.'" *Id.* at 3. But see *supra* note 86 for Chairman Pitofsky's remarks that seem to imply the contrary.

[116] This reluctance could be caused by the enforcers' belief that the judges who would hear their cases on appeal would be likely to be conservative and unlikely to uphold their use of the incipiency doctrine. Aggressive enforcers might instead tighten enforcement in more subtle ways, such as more tightly defined markets. *See supra* note 81.

[117] *Id.*; *see also supra* notes 86 & 115. I am not aware of any empirical research on the merger wave or "copycat" issues. Suppose, for example, that a merger is announced and eight out of ten analysts who follow the industry predict that, if the merger were permitted, there would soon be several additional mergers in the same industry. It would be very useful to know how often this type of prediction is accurate.

[118] Today we know a great deal more about the likely effects of mergers than we did a generation ago, and there is little doubt that our ability to forecast will continue to improve. In order to implement several of the incipiency mandates described in Part II, however, the antitrust enforcers and the antitrust profession generally should concentrate more of their efforts on learning how to make the appropriate forecasts with even more rigor and confidence. We have to incorporate insights from investment bankers, industry specialists, and forecasting experts of various types. Predictions are a necessary part of antitrust, and the profession has been remiss in not having as a higher priority becoming better at this task.

[119] The three largest firms were reported to have a combined total of approximately 59–67% of this market. *See, e.g.*, Robin Fields & Melinda Fulmer, *Markets' Shelf Fees Put Squeeze on Small Firms*, L.A. TIMES, Jan. 29, 2000, at A1, *available at* 2000 WL 2205589; Deborah Belgum, *Upscale Chain Bristol Farms Launches Major Expansion Drive*, L.A. BUS. J.,

from 5,365 to its current level during the past half-century were beneficial for consumers or, at worst, were harmless. But, increasingly, we are starting to ask whether consumer welfare is best served by markets dominated by only three firms. There is, for example, recent literature which suggests that food prices are higher in more highly concentrated grocery retailing markets.[121] Perhaps in part for this reason, merger enforcement has become more vigorous in recent years.

Even more vigorous enforcement could arise if the relevant decisionmakers believed, contrary to the conclusions of the more conservative decisionmakers described in Part III, that the intellectual bases for strong enforcement have not significantly been undermined and that stricter enforcement would be in the public interest. They could be faithful to the Congressional intent underlying the incipiency doctrine by their more serious embrace of one or more of the meanings of incipiency described in Part II.

As a concrete step, the Merger Guidelines could be revised to include incipiency considerations in several ways: (1) the Guidelines could give substantially more emphasis to the possibility that a merger might diminish nonprice aspects of consumer choice; (2) the Guidelines's introductory sections could explain Congress's desire for strict enforcement in several ways, including a concern with small harms to competition, errors, and probabilities; (3) the Guidelines could include, as a factor, whether a merger is likely to spark an industry-wide trend or wave towards unduly high levels of concentration; (4) the Guidelines could indicate that anticompetitive effects are more likely to the extent that the HHI increase

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Nov. 15, 1999, at 10, *available at* 1999 WL 11382499; Richard Turcsik, *Seismic Shift*, PROGRESSIVE GROCER, Aug. 1, 1999, at 9, *available at* 1999 WL 9721173.

[120] Many other factors were also at work.

[121] One study concluded, "[O]ur results find a positive linkage between concentration and prices even after holding costs and quality/service constant. The results of this study are consistent with six other studies that found a significant positive relationship between grocery store prices and the concentration of sales in local markets." Bruce W. Marion et al., *Strategic Groups, Competition and Retail Food Prices, in* COMPETITIVE STRATEGY ANALYSIS IN THE FOOD SYSTEM 197 (Ronald W. Cotterill ed., 1993); *see also* Bruce W. Marion, *Competition in Grocery Retailing: The Impact of a New Strategic Group on BLS Price Increases*, 13 REV. INDUS. ORG. 381, 398 (1998) (reporting the same results of the above study when utilizing updated information); Ronald W. Cotterill, *Market Power and the Demsetz Quality Critique: An Evaluation for Food Retailing*, 15 AGRIBUSINESS 101 (1999); Ronald W. Cotterill et al., *Assessing the Competitive Interaction Between Private Label and National Brands*, 73 J. BUS. 109 (2000); R. McFall Lamm, *Prices and Concentration in the Food Retailing Industry*, 30 J. INDUS. ECON. 67 (1981); Frederick E. Geithman et al., *Concentration, Prices and Critical Concentration Ratios*, 63 REV. ECON. & STAT. 346 (1981); Bruce W. Marion et al., *Price and Profit Performance of Leading Food Chains*, 61 AM. J. AGRIC. ECON. 420 (1979); Ronald W. Cotterill, *Market Power in the Retail Food Industry: Evidence from Vermont*, 68 REV. ECON. & STAT. 379 (1986).

and postmerger HHI level are above the Guidelines's 100/1800 thresholds;[122] and (5) the Guidelines could state that mergers likely to have an initial anticompetitive effect within five years of the time when the merger occurs will be blocked.[123]

In addition, the term "incipiency," no matter how defined, has acquired pejorative connotations, so there might be a disadvantage to attempting to attach this label to the consumer choice characterization of the antimerger laws. It might make more sense to use the approach on its own. The idea that merger policy could center around consumer choice has the advantage of being relatively new.[124] The paradigm has never been undermined directly by the literature which has weakened our certainty over the extent to which concentration leads to higher prices or profits. It has no awkward baggage and has never been rejected by the courts, so its adoption would require no overturning of precedent. It is both forward-looking and faithful to the letter and spirit of *Philadelphia National Bank* and other respected antitrust cases.

Revitalized merger enforcement under any of these approaches could only happen, however, under special circumstances. It would require the will of aggressive, risk-taking antitrust enforcers acting in a political climate that was supportive and provided adequate enforcement budgets. In addition, the main stumbling block to the revival of more robust antimerger enforcement currently is the courts' lack of desire to implement such a policy, so the further revival of incipiency awaits judges who will more faithfully implement congressional intent.

Since many mergers are abandoned after they are challenged, the enforcers do have a limited ability to implement a weak version of the incipiency doctrine even now. And, because the Merger Guidelines do receive some respect from the courts, it certainly would be helpful to

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[122] For example, the Guidelines could contain a "presumption" that mergers above the 100/1800 thresholds will create market power, and a "very strong presumption" that mergers above a 400/2500 threshold will create market power. Alternatively, the Guidelines could state:

> A merger that increases the HHI by more than 100 points to a level in excess of 1800 points creates a rebuttable presumption that the merger will result in significant anticompetitive effects. The greater the HHI increase and level, the less likely that the factors contained elsewhere in these Guidelines will overcome this presumption. For example, this presumption will rarely be overcome if this increase exceeds 400 and the resulting level exceeds 2500.

[123] The five-year period was chosen for illustrative purposes only. This period should, however, be longer than the one-year parameters used elsewhere in the Guidelines.

[124] Although the consumer choice approach to merger enforcement originated in *Philadelphia National Bank*, *see supra* notes 47–50 and accompanying text, this history has largely been forgotten.

amend the Guidelines to better incorporate Congressional incipiency concerns.[125] The merging parties know, however, that if they resist the enforcers they are likely to have the issues decided by conservative judges, so the enforcers can only pursue this approach so far. Even under the best of assumptions, it is unclear how far this increased aggressiveness could go. But the foundation for stricter merger enforcement through the incipiency doctrine exists today.

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[125] If the Merger Guidelines are not amended and the enforcers tried, for example, to block a merger on the grounds that it would be likely to cause a merger wave, defendants would cite the Guidelines's omission of this factor as an additional reason for the court to reject the argument.